

# Effective Mechanisms of Consumer Protection – A Comparative Analysis of Japanese and German Laws in Relation to Price Adjustments for Utilities

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## I. SETTING THE SCENE

This paper intends to present a comparative study of the ancillary provisions in utility contracts for consumers<sup>1</sup> in Germany and Japan. I consider that this particular type of contract is an excellent example for demonstrating how significantly regulatory approaches aiming at consumer protection may vary.

When focusing on the relationship between the parties to a utility contract – a consumer and a utilities company such as *RWE* in Germany<sup>2</sup> or Hokkaido Electric Power

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1 In this text, a narrow interpretation of the term “consumer” is used, as defined by § 13 BGB (*Bürgerliches Gesetzbuch*, German Civil Code): a “natural person who enters into a legal transaction mainly for a purpose that is outside his trade, business or profession” (own translation).

2 *RWE* is chosen as an example as one of their contract terms was the subject of a recent decision by the Court of Justice of the European Union (CJEU), cf. *infra* III.2.

Company in Japan<sup>3</sup> – civil law appears to be the primary means for regulating the relationship between them.<sup>4</sup> The contract, in both countries, is based on standardized terms pre-drafted by the utilities company which the consumer has to accept in order to conclude the contract. The legal situation in Japan, however, is significantly different from that in Germany and currently subject to reform debates (2.). In order to understand the role of civil law in the particular context of utility contracts, it must be considered against the backdrop of the sector-specific regulations in place in each country (1.).

### 1. *Utility markets as regulated markets*

The supply of utilities such as gas or electricity is considered a service to the public and is therefore subject to specific regulation in Japan as well as in Germany. On the most general level, regulation may be defined as any “legally justified actions by governments to limit or control the behaviors of individuals and firms.”<sup>5</sup> Such an intrusion into the freedom to arrange one’s personal or business affairs may, inter alia, be justified when the aim is to remedy a shortcoming of market mechanisms, but it may also serve to promote value judgments.<sup>6</sup>

The regulation of the energy and gas market for consumers in Japan also falls into both categories: on the one hand, the natural monopoly is preserved by a strict entry control; on the other hand, price, quantity, and quality of supply are also subject to governmental control in order to prevent the exploitation of consumers.<sup>7</sup> The standard terms used by electricity and gas suppliers must be approved by the Agency for Natural Resources and Energy (belonging to the Ministry of Trade and Economy, hereinafter: METI), which is also in charge of approving price increases.<sup>8</sup>

Conversely, the German market for consumer utilities has been liberalized in the wake of the European Union’s efforts<sup>9</sup> to establish a competitive internal market for the supply of gas and electricity.<sup>10</sup> Even though the four biggest utility companies (RWE, Eon, EnBW and Vattenfall) are dominant providers in distinct regions, several smaller

3 *Hokkaidō denryoku kabushiki kaisha*, in short: Hokuden; Hokuden is chosen as an example because it was the first company to apply for a price increase for consumer contracts after the triple disaster of 11 March 2011; see: [http://www.hepco.co.jp/english/pdf/electricity\\_rates.pdf](http://www.hepco.co.jp/english/pdf/electricity_rates.pdf); cf. *infra* II.2.b)bb).

4 Cf. on the notion of “private ordering” e.g. G. BACHMANN, *Private Ordnung* (Tübingen 2006) 260.

5 F. MIZUTANI, *Regulatory Reform of Public Utilities* (Cheltenham 2012) 4.

6 MIZUTANI, *supra* note 5, 4.

7 MIZUTANI, *supra* note 5, 6, 8, 66 (for the consumer gas market).

8 See *infra* at II.2.b)bb).

9 Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211 of 14.08.2009, 55; Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211 of 14.08.2009, 94.

10 Cf. [http://www.bundesnetzagentur.de/cln\\_1422/EN/Areas/Energy/Companies/GeneralInformationOnEnergyRegulation/HistoryOfLiberalisation/historyofliberalisation\\_node.html](http://www.bundesnetzagentur.de/cln_1422/EN/Areas/Energy/Companies/GeneralInformationOnEnergyRegulation/HistoryOfLiberalisation/historyofliberalisation_node.html).

energy providers have established themselves, providing consumers with a choice of alternative suppliers. Neither rates nor any other terms in the contract between a consumer and a supplier are subject to administrative review. The Federal Network Agency (*Bundesnetzagentur*) is merely tasked with supervising the rates which the network operators<sup>11</sup> charge the energy supply companies for access to the supply grid, thus indirectly maintaining the competitiveness of the downstream market.<sup>12</sup>

## 2. *Special regimes for standard terms in civil law*

### a) *Justifications*

Whereas competition in the utilities sector is naturally restricted due to the need to access the grid, the market failure caused by the use of standardized contract terms is of a different kind:<sup>13</sup> the “small-print” commonly includes extensive ancillary provisions, for example, pertaining: (i) to the termination or alteration of the contract, the price, or of other terms; (ii) to claims for default or for damage occurring in the course of the contractual relationship; and (iii) to the applicable law and forum in case of a dispute. Compared to the transaction’s overall value from the consumer’s perspective, it would require disproportionate time, effort, and money to review and compare the terms of several offerors. Consequently, it is common for consumers not to read the small-print at all. Due to the resulting information asymmetry problem,<sup>14</sup> businesses have no incentive to provide high-quality terms since these could increase their contracting costs and would neither yield an advantage over their competitors nor justify a higher price as

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11 The companies owning the networks had to be separated from the companies directly supplying energy to end-users because of the unbundling measures introduced in §§ 6–10 EnWG in 2005, cf. G. HENDRICH, *Energiewirtschaftsgesetz B 1 Einleitung*, in: Danner/Theobald (eds.), *Energierrecht* (2013) paras. 29 et seq.

12 §§ 20 et seq. EnWG, cf. G. HENDRICH, *supra* note 11, paras. 66 et seq.; Anreizregulierungsverordnung, BGBl. I 2007, 2529; cf. HUMMEL *Energiepreisrecht*, B 1 Einführung, in: Danner/Theobald (eds.), *Energierrecht* (2013) para. 20; see also [http://www.bundesnetzagentur.de/cln\\_1422/EN/Areas/Energy/Companies/GeneralInformationOnEnergyRegulation/ResponsibilityAndTaskDelimitation/responsibilityandtaskdelimitation\\_node.html](http://www.bundesnetzagentur.de/cln_1422/EN/Areas/Energy/Companies/GeneralInformationOnEnergyRegulation/ResponsibilityAndTaskDelimitation/responsibilityandtaskdelimitation_node.html).

13 Cf. for the following (from a German perspective): H. KÖTZ, *Gutachten A*, 50. Juristentag (1974) 31 et seq.; M. ADAMS, *Ökonomische Begründung des AGB-Gesetzes*, in: Betriebsberater 1989, 784; H.-B. SCHÄFER/C. OTT, *Ökonomische Analyse* (5th ed., Berlin 2012) 552–555; G. WAGNER, *Mandatory Contract Law*, in: *Erasmus Law Review* 3 (2010) 61 et seq.; for the U.S. American view: L. GOLDMANN, *My Way and the Highway*, in: *Northwestern Law Review* 86 (1992) 718; R. KOROBKIN, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, in: *University of Chicago Law Review* 70 (2003) 1233; O. GAZAL-AYAL, *Economic analysis of standard form contracts: the monopoly case*, in: *European Journal of Law and Economics* 24 (2007) 120.

14 Cf. generally for the phenomenon of a “race to the bottom” due to adverse selection G. AKERLOF, *The market for “lemons”*, in: *Quarterly Journal of Law and Economics* 84 (1970) 488–500.

better terms would go unnoticed by consumers. This problem has long been discussed worldwide.<sup>15</sup> Nonetheless, the legal responses to it differ.

*b) Overview of the legal basis in Germany and Japan*

The contract terms in question would under German law fall within the scope of §§ 305–310 BGB,<sup>16</sup> thus qualifying as standard terms (*Allgemeine Geschäftsbedingungen*, AGB). For consumer contracts, the European Directive on Unfair Contract Terms<sup>17</sup> (UTD) has to be considered as well. According to §§ 305 para. 1 s. 1, 310 para. 3 no. 1 BGB as well as Art. 3 para. 2 UTD, applicable terms are those that are pre-formulated and presented by the business to the consumer upon conclusion of the contract. The price and the main subject matter of a contract are exempt from control, § 307 para. 3 BGB.<sup>18</sup> Such terms only become part of the contract if the conditions of accessibility and transparency set out in §§ 305–305c BGB are met (*Einbeziehungskontrolle*), and their contents are subject to review by civil courts (*Inhaltskontrolle*, §§ 307–309 BGB). A comparably narrow definition is not found in Japanese civil law,<sup>19</sup> nor are the inclusion or the contents of standardized contract terms regulated in a comparable way. Art. 90 Civil Code (CivC)<sup>20</sup> has been used, on occasion, to set aside unfair contract terms.<sup>21</sup> Another practically important gateway to policing standard terms is through

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15 The notion of “contract of adhesion” was coined by E. PATTERSON, *The Delivery of a Life-Insurance Policy*, in: *Harvard Law Review* 33 (1919) 222 (with references to the earlier French literature); cf. later L. RAISER, *Das Recht der Allgemeinen Geschäftsbedingungen* (Hamburg 1935); F. KESSLER, *Contracts of adhesion*, in: *Columbia Law Review* 43 (1943) 632; D. ALLAN/S. GAUTAMA et al. (eds.) *Asian Contract Law* (Melbourne 1969); S. KAWAKAMI, *Yakkan kisei no hōri* [Legal Theory on the Regulation of Standard Form Agreements] (Tokyo 1988).

16 English version available at: [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0905](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0905).

17 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95 of 21.04.1993, 29.

18 The distinction between the main subject matter of a contract and ancillary provisions may be difficult to draw. In two recent decisions on contracts between two businesses for the supply of gas, the German Supreme Court ruled that a provision designating the price at contract conclusion belongs to the contractual price, whereas a term relating to future, as yet uncertain price adjustments constitutes an ancillary term, cf. BGH, in: *Neue Juristische Wochenschrift* 2014, 2708; BGH, in: *Neue Juristische Wochenschrift* 2014, 2715.

19 DERNAUER, § 11 *Allgemeine Geschäftsbedingungen*, in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Köln 2011) paras. 2 et seq.

20 *Minpō*, Act No. 89 of 27.04.1896 as amended by Act No. 78 of 2006; for all Acts cited in this report, the English translations provided by the Ministry of Justice are used. Art. 90 provides the following: “A juristic act with any purpose which is against public policy is void.” (Available at: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2057&vm=04&re=02>).

21 M. DERNAUER, *Verbraucherschutz und Vertragsfreiheit im japanischen Recht* (Tübingen 2006) 153 et seq., 179 et seq.; on the projected reform of Art. 90 CivC see H. DÖRING, *Das Recht der Allgemeinen Geschäftsbedingungen im Rahmen der japanischen Schuldrechtsre-*

rules on unfair commercial practices.<sup>22</sup> In addition, Arts. 8–10 of the Consumer Contract Act introduced in 2000 (ConsCA)<sup>23</sup> contain a content control resembling the structure of §§ 307–309 BGB, though it covers all consumer contracts, regardless of whether they are individually negotiated or pre-formulated.<sup>24</sup> Both pieces of legislation are currently under review for substantial reform (*infra* II.1.b)aa)).

### 3. Outline

When it comes to the enforcement of consumer rights, the Japanese approach has been somewhat different from the German one. Traditionally, enforcement in Germany has been described as rather reactive, relying on courts to sanction breaches *ex post*, while the Japanese approach is said to be proactive through administrative monitoring, investigation and sanctioning.<sup>25</sup> In recent years, however, reforms have been debated or implemented which have aligned the approaches of the redress mechanisms to some extent. This will be shown in the following section by looking at the legal rules (1.), the administrative control (2.), and the judicial review (3.) of standard terms in Japan<sup>26</sup> in relation to consumer utility contracts. Section III. will compare the findings to the legal situation in Germany (III.1.), where the recent recent CJEU decision in the *RWE* case has caused some controversy in the seemingly settled system governing the judicial review of standard form contracts (III.2.).

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- form, in: ZJapanR/J.Japan.L. 19 (2014) 227, 237; H. SONO, Private Enforcement of Consumer Law: A Sketch of the Japanese Landscape, in: Hokkaido Journal of New Global Law and Policy 16 (2012) 71; the conditions, however, rather resemble § 138 BGB, prohibiting unfair, deliberate exploitation of an inferior situation.
- 22 K. NAKATA, Japanisches Verbrauchervertragsrecht, in: Shakai kagaku kenkyū nenpō 40 (2010) 26.
- 23 *Shōhisha keiyaku hō*, Act No. 61 of 12 May 2000, available at: <http://www.japaneselawtranslation.go.jp/law/detail/?id=108&vm=04&re=02>.
- 24 DERNAUER, *supra* note 19, para. 4 et seq.; contrary to its broad wording, Art. 10 ConsCA is taken to exclude the main subject matter, cf. NAKATA, *supra* note 22, 27. A similarly wide approach was suggested in the first Proposal for the UTD presented by the European Commission in 1990. Due to strong resistance from several Member States, the scope of the eventually adopted UTD is considerably narrower, comprising only pre-formulated terms and excluding the main subject matter from contents control; cf. for a detailed account of the legislative history of the UTD L. NIGLIA, The Transformation of contract law in Europe (The Hague 2003) chapter 3.
- 25 M. FAURE/A. OGUS/N. PHILIPSEN, Enforcement Practices for Breaches of Consumer Protection Litigation, in: Loyola Consumer Law Review 20 (2008) 373 et seq.; cf. in this sense also A. KARAIKOS, Regulation of Unfair Contract Terms in Japan, in: Waseda Bulletin of Comparative Law 28 (2010) 19 particularly on the review of standard contract terms.
- 26 This structure follows the example of DERNAUER, *supra* note 19; ID., *supra* note 21.

## II. LEGAL BASIS AND ENFORCEMENT IN JAPAN

### 1. *Rules in civil law*

#### a) *Mandatory rules and the general clause of Art. 90 CivC*

Standard form contracts are important where an issue is not governed by mandatory law. It is only in areas of contractual freedom that legal default rules may be supplanted by agreements between the parties that suit their needs better.<sup>27</sup> However, Japanese law contains a number of mandatory rules, especially where services for the public are concerned (e.g. on housing leases<sup>28</sup>) or when protection from abusive business practices seems necessary (e.g. to fight predatory lending).<sup>29</sup> Conceptually, these provisions form a part of administrative law, to which legal consequences of a private law nature have been added.<sup>30</sup>

Where such specific legislation is in place, a standard term cannot contain any deviation. It should be noted, however, that despite clear legal provisions, a business may in practice still use prohibited terms if consumers are unaware of the protective legislation and therefore do not contest the term's validity.

In the absence of mandatory provisions, parties are in general free to stipulate the contents of the contract. In today's commerce, the use of standardized contract terms by businesses is widespread since it reduces the costs of negotiating the specifics of each transaction.<sup>31</sup> Even though Japanese law does not contain any provisions specifically tailored to regulate standardized contracts, these are still subject to the limitations applicable to any agreement. In the past, the general clause of Art. 90 CivC has been used as a basis to deny the enforcement of standardized terms that were seen as contrary to public policy.<sup>32</sup> However, a consistent application (through the establishment of groups of unfair terms, for example) has not been developed.<sup>33</sup>

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27 See generally F. MÖSLEIN, *Dispositives Recht* (Tübingen 2011) 36; H. UNBERATH/J. CZIUPKA, *Dispositives Recht welchen Inhalts?*, in: *Archiv für die civilistische Praxis* 209 (2009) 52 et seq.; C. VELJANOVSKI, *Economic Principles of Law* (Cambridge 2007) 123.

28 *Shakuchi shakuya-hō* (Act on Land and Building Leases) No. 90/1991; cf. DERNAUER, *supra* note 19, para. 6.

29 Cf. for an account of the social problems – such as increased suicide rates – resulting from aggressive debt collection and the measures taken by the courts and the legislator A. PARDIECK, *Japan and the Moneylenders – Activist Courts and Substantive Justice*, in: *Pacific Rim Law and Policy Journal* 17 (2008) 561 et seq.

30 See K. NAKATA, *Recent Developments in Japanese Consumer Law*, in: Nakata/Kano (eds.), *Recent Tendencies of Consumer Law and Advertising Law in Europe and Japan* (Tokyo 2011) 543.

31 MüKo BGB/BASEDOW Vorb. §§ 305 ff., para. 1; ADAMS, *supra* note 13, 782; H. KÖTZ, *Die Effizienz von Haftungsausschlussklauseln*, in: Ott/Schäfer (eds.), *Allokationseffizienz in der Rechtsordnung* (Berlin et al. 1989) 193; A. KATZ, *Standard Form Contracts*, in: Newman et al. (eds.), *The New Palgrave Dictionary of Economics and the Law* (London et al. 1998), vol. III, 3.

32 DERNAUER, *supra* note 19, para. 38; DÖRING, *supra* note 21, 227.

33 Conversely in Germany, the law on unfair terms was originally developed in jurisprudence, cf. P. HELLWEGE, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen*

b) *Consumer Contract Act*<sup>34</sup>aa) *Structure of the ConsCA*

The ConsCA has been in force since April 1, 2001.<sup>35</sup> Three of its articles pertain to the contents of consumer contracts: Art. 8 contains five prohibited clauses, mainly regarding undue limitations on the business' liability; Art. 9 declares void two types of terms requiring the consumer to pay excessive damages or penalties; and Art. 10 prohibits any term creating a detrimental legal position for the consumer against her interests in light of the principle of good faith. While Art. 8 and Art. 9 ConsCA have been lauded as a step towards greater legal certainty,<sup>36</sup> the application of the open-ended general clause in Art. 10 ConsCA has proven difficult. Art. 10 ConsCA arguably consists of two elements: a legal disadvantage for the consumer and the impairment of the consumer's interests contrary to good faith.<sup>37</sup> It is the latter element which is particularly difficult to grasp: Art. 10 ConsCA does not mention good faith but only refers to Art. 1 para. 2 CivC where the notion is declared to be a fundamental principle of civil law.<sup>38</sup> However, it has been persuasively argued<sup>39</sup> that a stricter standard should be applied in the context of the ConsCA in order to realize its intended level of consumer protection, an aim alien to the CivC. Introducing a special provision in Art. 10 ConsCA would not have been necessary if the same legal consequences could have been derived from the pre-existing Art. 1 para. 2 CivC; indeed, the consumer would be better off relying on the general provision since Art. 10 ConsCA contains the additional requirement of showing an impaired legal position.

bb) *Case law under Arts. 8–10 ConsCA*

The evaluation report on the ConsCA of 2007<sup>40</sup> found that several cases had been brought under Art. 9, mainly concerning terms denying the refund of school application fees or of deposits for lease agreements.<sup>41</sup> Unlike its equivalent in German law, § 307 BGB,<sup>42</sup> the

gen und die allgemeine Rechtsgeschäftslehre (Tübingen 2010) 146 et seq., 290 et seq.; Historisch-kritischer Kommentar/HOFER §§ 305–310 paras. 8 et seq.

34 DERNAUER, *supra* note 21, 259 et seq.

35 A. YAMAGAMI, Consumer Administration in Japan and Hyogo Prefecture (2004) 3, available at: <http://www.jftc.go.jp/eacpf/05/jicatext/sep03con.pdf>.

36 KARAIKOS, *supra* note 25, 28 et seq.; an extension of these lists has been suggested, see NAKATA, *supra* note 30, 547.

37 KARAIKOS, *supra* note 25, 32 et seq.; cf. similarly NAKATA, *supra* note 22, 27.

38 Art. 1 para. 2 CivC: "The exercise of rights and performance of duties must be done in good faith."

39 KARAIKOS, *supra* note 25, 38.

40 *Shōhisha keiyakuhō no hyōka oyobi ronten no kentō-tō ni tsuite* [Evaluation of the Consumer Contract Act and topics for discussion], available at: <http://www.consumer.go.jp/seisaku/shingikai/hokokusyo/hokokusyo.html>.

41 KARAIKOS, *supra* note 25, 40.

general clause had not yet generated a large body of case law. Several decisions had been rendered on Art. 10 ConsCA by lower courts, with differing outcomes.<sup>43</sup>

In 2011, the Japanese Supreme Court dealt with two types of terms regarding different types of accessory costs for lease agreements on the basis of Art. 10 ConsCA. In the first case, the term at issue provided for an automatic, lump-sum deduction from the security deposit, regardless of whether any repairs were actually necessary at the end of the lease (*shikibiki*).<sup>44</sup> According to the Supreme Court, Art. 10 ConsCA requires a weighing of interests in order to determine a term's fairness. The purpose of *shikibiki* was to cover the maintenance cost of wear and tear; as long as this was expressed clearly in the contract, recovering these costs through *shikibiki* rather than through a higher rent was declared permissible.<sup>45</sup>

In the second line of cases, a fee to be paid in order to renew a lease agreement (*kōshinryō*) was contested.<sup>46</sup> Again, the Supreme Court underlined the importance of transparency: As long as this was clear from the terms of the contract, a renewal fee to cover maintenance costs was not unfair under Art. 10 ConsCA.<sup>47</sup> More recently, it has been observed that real estate companies have begun stating the overall amount of expenses for a lease agreement rather than setting out different types of fees.<sup>48</sup>

It should be noted that under German law, the main issue in these cases would probably be whether the terms concern the contract price or ancillary costs. The contract price is exempt from judicial review. Traditionally, it is the landlord's responsibility to keep lodgings in a state fit to use (§ 535 para. 1 s. 2 BGB) and expenses caused by ordinary deterioration are covered by the rental payments.<sup>49</sup> The tenant can be obliged, in stand-

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42 Some commentators even deplore the avalanche of cases, see e.g. F. GRAF V. WESTPHALEN, AGB-Recht im Jahre 2013, in: Neue Juristische Wochenschrift 2014, 2250; H.-W. MICKLITZ/N. REICH, Von der Klausel- zur Marktkontrolle, in: Europäische Zeitschrift für Wirtschaftsrecht 2013, 458.

43 Evaluation of the Consumer Contract Act, *supra* note 40, 20; cf. also KARAIKOS, *supra* note 25, 42.

44 Cf. SONO, *supra* note 21, 72; M. OKINO, Recent Developments in Consumer Protection in Japan, in: UT Soft Law Review 2012, 12.

45 Cf. Supreme Court Judgment of 24.03.2011, Minshū 65-2, 903 (see for the German summary: TIDTEN, Überblick über wichtige zivil- und zivilverfahrensrechtliche Entscheidungen des japanischen Obersten Gerichtshofs aus dem Jahre 2011, in: J.Japan.L. 37 (2014) 272; Supreme Court Judgment of 12.07.2011, Hanrei Jihō 2128 43.

46 Supreme Court Judgment of 15.07.2011, Minshū 65-2, 2269, German summary by TIDTEN, *supra* note 45, 272 et seq.

47 OKINO, *supra* note 44, 13.

48 OKINO, *supra* note 44, 13 et seq.

49 BeckOK BGB/EHLERT § 535 BGB, paras. 209 et seq.

ard terms, to perform cosmetic repairs only as the need arises; a global obligation to renovate every second year, for example, is not permissible.<sup>50</sup>

*c) Legal reform and the need for judicial review*

The CivC, enacted in 1896, is currently under review for a fundamental reform.<sup>51</sup> One novelty discussed was the introduction of rules on standard terms in the CivC, which – following the German model – would not be limited to consumer contracts.<sup>52</sup> In the legislative proposal published by the government on August 26, 2014, however, the corresponding section has been left blank due to persistent resistance from the Japan Business Federation.<sup>53</sup> Nevertheless, deliberations on the issue have not been abandoned but have been merely postponed until December 2014.

At the same time, consultations on a revision of the ConsCA have been launched.<sup>54</sup> A recent proposal by the Japan Federation of Bar Associations (*Nichibenren*)<sup>55</sup> includes a definition of standard terms and rules on their inclusion (Art. 13), a duty of transparency (Art. 14), interpretation *contra proferentem* (Art. 15), a general clause (Art. 16), a black list of thirteen prohibited terms (Art. 17), and a grey list of seventeen points (Art. 18). Generally, the content and structure of this proposal bear a striking resemblance to §§ 305–309 BGB. Also, it seems that the revision of the ConsCA may serve as an opportunity to introduce those changes that failed to make it into the CivC reform in the narrower context of consumer contracts.

*aa) Content Control (Inhaltskontrolle)*

At first glance, there seems little need for judicial review, given that many contracts contain terms that are either pre-approved by a government agency or adopted from model terms used industry-wide.<sup>56</sup> To be sure, Japanese law provides alternative mechanisms for many of the issues that, under German law, need to be addressed by civil courts applying §§ 307–309 BGB. However, there seems to be some room for civil litigation, especially where the subject matter falls outside the scope of supervision by an

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50 BGH, in: *Neue Juristische Wochenschrift* 2004, 2587; see also BGH, in: *Neue Juristische Wochenschrift* 2014, 1444 para. 22; BGH, in: *Neue Juristische Wochenschrift* 2006, 3778 paras. 13 et seq.; cf. BeckOK BGB/EHLERT § 535 BGB, para. 193.

51 Cf. the information by the Ministry of Justice, available at: [www.moj.go.jp/ENGLISH/ccr/CCR\\_00001.html](http://www.moj.go.jp/ENGLISH/ccr/CCR_00001.html); NAKATA, *supra* note 22, 21.

52 NAKATA, *supra* note 22, 27; DÖRING, *supra* note 21, 230, 232.

53 The draft published on August 26, 2014 is available at: <http://www.moj.go.jp/content/001127038.pdf>. Art. 28, entitled *Teikei yakkan* (standard terms), is left blank.

54 Letter by Prime Minister Abe to the Commission President, Shoji Kawakami of 5 August 2014.

55 Available at: [http://www.nichibenren.or.jp/library/ja/opinion/report/data/2014/opinion\\_140717\\_3.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/2014/opinion_140717_3.pdf).

56 DERNAUER, *supra* note 19, para. 15; ID., *supra* note 21, 413, 418 et seq.; DÖRING, *supra* note 21, 225.

agency or a business association (see *infra* II.2.a)). So far, the judiciary has been hesitant in applying the general clause of Art. 10 ConsCA which is perceived to be difficult to handle because it lacks a concrete test. Scholars argue for the introduction of lists of prohibited clauses, such as those proposed by *Nichibenren* in Arts. 17 and 18. From the experience in Germany after the introduction of §§ 308, 309 BGB, it can be learned that lists can produce a positive effect in that businesses, of their own accord, checked their terms against the easily accessible lists and corrected them. Rather quickly, the focus of litigation turned on the general clause<sup>57</sup> and the lists are of limited value today as they were never updated after their introduction in 1976.

*bb) Inclusion into the contract (Einbeziehungskontrolle)*

Secondly, courts are in the best position to check whether standard terms have been validly incorporated in individual contracts (*supra* II.1.bbb)). From a German perspective, standard terms can only become part of a contract if they were pointed out and made available to the consumer before the contract was concluded (see § 305 para. 2 no. 1, 2 BGB).<sup>58</sup> Conversely, Japanese courts are said to keep adhering to the doctrine of “presumed will”: when a contract has been concluded based on standard terms, it is presumed that a consumer wanted to include them.<sup>59</sup> However, the Supreme Court required that *shikibiki* and *kōshinryō* be clearly spelled out in the written contract (*supra* II.1.bbb)).<sup>60</sup> Such a requirement of transparency bears some resemblance to the control of inclusion under German law. If this doctrine was extended beyond the field of lease agreements, practices where standard terms are not even accessible when a contract is concluded would no longer be permissible.

In any case, whether terms are properly included in the contract is a question of construction. Ultimately, this is a matter best resolved by civil litigation. Consequently, it would be a useful guidance for judges if specific requirements for the proper inclusion of standard terms were spelled out by law, such as those contained in the first reform proposal for the CivC<sup>61</sup> as well as in the *Nichibenren* proposal for amendments to the ConsCA.<sup>62</sup>

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57 H.-J. BUNTE, *Zehn Jahre AGBG – Rückblick und Ausblick*, in: *Neue Juristische Wochenschrift* 1987, 922; critically on the diversity of case law under § 307 BGB see H.-W. MICKLITZ, *Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts*, in: Collins (ed.), *Standard Contract Terms in Europe (Alphen aan den Rijn 2008)* 28.

58 Cf. e.g. BGH, in: *Neue Juristische Wochenschrift* 2010, 864 para. 38; BeckOK BGB/ROTH § 305 BGB paras 44 et seq.; MüKoBGB/BASEDOW § 305 BGB paras. 58 et seq., 66 et seq.

59 DERNAUER, *supra* note 19, para. 21.

60 Cf. translation by OKINO, *supra* note 44, 12 et seq.; for a similar judgment rendered in 2005 prior to the applicability of the ConsCA cf. OKINO, *supra* note 44, 11.

61 DÖRING, *supra* note 21, 233 et seq.

62 Art. 13, see *supra* II.1.c).

d) *Judicial review as an efficient remedy against unfair terms?*

It is a well-rehearsed argument that private litigation is used less frequently in Japan than in other Western countries to resolve disputes.<sup>63</sup> In the case of unfair contract terms, several factors make judicial review seem rather unattractive as a remedy: Generally, the cost and duration of litigation may often seem disproportionately high in comparison to the harm done by the unfair term.<sup>64</sup> Also, consumers are often not aware of their rights since the evaluation of a term's fairness usually requires detailed legal knowledge.<sup>65</sup> Specifically in Japan, terms with governmental approval stand little chances of being struck down in civil court, and Japanese courts have traditionally been rather hesitant to render contract terms void.<sup>66</sup>

In the wake of far-reaching reforms aimed at fostering private litigation in Japan,<sup>67</sup> the ConsCA was amended in 2008 to allow qualified consumer organizations to demand injunctions against the use of unfair terms. As of May 2014, eleven organizations have been registered.<sup>68</sup> A total of 252 cases falling within the scope of Art. 8–10 ConsCA have been registered, of which only two led to a court judgment.<sup>69</sup> The overwhelming majority have been resolved by negotiations between the consumer organization and the

63 Cf. for an overview of the research on the topic and changes since the 1990s T. GINSBURG/G. HOETKER, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, in: *Journal of Legal Studies* 35 (2006) 31; challenging the classical view cf. J. HALEY, *Litigation in Japan: A New Look at Old Problems*, in: *Williamette Journal of International Law and Dispute Resolution* 10 (2002) 123 et seq.; cf. for empirical evidence M. RAMSEYER/E. RASMUSEN, *Comparative Litigation Rates*, in: *Harvard Law School Discussion Paper No. 681* (2010) 8; for a "relational" explanation see P. CORNE, *The Influence of Traditional Normative Mechanisms of Behaviour on the Japanese Legal System*, in: *Sydney Law Review* 12 (1990) 348 et seq.

64 See e.g. F. WEBER, *Gegenwärtige Verbraucherrechtsfälle und Bedarf an staatlicher Rechtsdurchsetzung*, in: *Verbraucher und Recht* 2013, 325 (with further references in note 31); H.-B. SCHÄFER, *The Bundling of Similar Interests in Litigation*, in: *European Journal of Law and Economics* 9 (2000) 184 et seq.; A. ROTKIN, *Standard Forms: Legal Documents in Search of an Appropriate Body of Law*, in: *Arizona State Law Journal* (1977) 614; T. NAKAGAWA, *Roles of Public Law in Consumer Redress*, in: *Shinsedai Hō Seisakugaku Kenkyū* 16 (2012) 116 et seq.

65 Cf. e.g. ADAMS, *supra* note 13, 784; M. FAURE/H. LUTH, *Behavioural Economics in Unfair Contract Terms*, in: *Journal of Consumer Policy* 34 (2011) 348.

66 Cf. DERNAUER, *supra* note 19, paras. 19 et seq., 28–44; cf. particularly on constitutional law H. BAUM, *The Role of Courts in Japan*, in: *MPI Research Paper* 14/6 (2014); J. HALEY, *The Role of Courts in Making Law in Japan*, in: *Pacific Rim Law and Policy Journal* 22 (2013) 491; disagreeing F. UPHAM, *Stealth Activism: Norm Formation by Japanese Courts*, in: *Washington University Law Review* 88 (2010) 1493; PARDIECK, *supra* note 29, 529 (specifically on consumer credit contracts).

67 Cf. e.g. HALEY, *supra* note 66, 491.

68 *Tekikaku shōhisha dantai*; see CONSAA, *Towards a Safe and Prosperous Life*, 2014, 17; the list of qualified organizations is available at: <http://www.caa.go.jp/planning/zenkoku.html>; cf. also NAKAGAWA, *supra* note 64, 116.

69 Cf. the overview available at: <http://www.caa.go.jp/planning/pdf/00sashitomejirei.pdf>.

business; it seems that the lurking threat of a – public – court sentence may have fostered the readiness of businesses to come to a compromise. Furthermore, a recently enacted law enables the qualified consumer organizations to bring collective damages actions<sup>70</sup> – a step which has been debated in the EU for years without having led to any legislative action.<sup>71</sup> It seemed necessary to add a means of collective redress in order for judicial review to become an effective tool.<sup>72</sup> Aside from the problem that judicial review as a regulatory tool depends on the consumer's willingness and ability to initiate court proceedings, no market-wide effect can be achieved. On the one hand, judges only consider the case at hand and have no insight into market practices – unless the parties provide comprehensive information in sophisticated submissions. On the other hand, a judgment has effects only *inter partes*, which means that a term considered unfair is only void in the particular contract at issue.<sup>73</sup> It may still be used and it is even conceivable that a different court may consider the same term fair.<sup>74</sup>

Currently, the Consumer Affairs Agency (ConsAA) is not a qualified body. It may be worthwhile considering extending its competencies in this regard. Due to its insights into nation-wide consumer complaints and its policy work, the ConsAA is in a good position to apply for injunctions in cases of abuse that adversely affect consumers in Japan. For a model, a look to the United Kingdom seems interesting. The British Competition and Markets Authority (CMA, formerly Office of Fair Trading) is a qualified body under English and EU law which can bring claims for an injunction.<sup>75</sup>

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70 See OKINO, *supra* note 44, 14 et seq.; T. SODA, New Developments of Collective Legal Protection in Germany and Japan, in: J.Japan.L. 37 (2014) 186, 193–195.

71 Cf. e.g. S. AUGENHOFER, Opinion on Commission Staff Working Document – Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173, 4, available at: [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/uugenhofer\\_susanne\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/uugenhofer_susanne_en.pdf).

72 KARAIKOS, *supra* note 25, 43; cf. also OKINO, *supra* note 44, 14.

73 However, in proceedings initiated by a consumer organization the litigated term is unfair in all contracts used by the trader against whom the injunction is imposed, cf. CJEU of 26.04.2012 Case C-472/10 *Invitel*, para. 38; cf. H.-W. MICKLITZ/B. KAS, Overview of cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I, in: *European Review of Contract Law* 10 (2014) 17.

74 This has occurred under the European UTD: Courts in different Member States came to different evaluations of the same terms despite the UTD, see for examples E.-M. KIENINGER, Die Vollharmonisierung des Rechts der Allgemeinen Geschäftsbedingungen – eine Utopie?, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 73 (2009) 801; M. TROCHU, Les clauses abusives dans les contrats conclus avec les consommateurs, in: *Recueil Dalloz Sirey* 43 (1993) 315; C. AMATO, Contract Terms in Search of Harmonization, in: Collins (ed.), *Standard Contract Terms in Europe* (Alphen aan den Rijn 2008) 191.

75 Competition and Markets Authority, Guidance on the CMA's approach to use of its consumer powers, April 2014, point 3.10 and p. 55, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288624/CMA7\\_Consumer\\_Protection\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288624/CMA7_Consumer_Protection_guidance.pdf).

## 2. Administrative competencies

### a) Public enforcement of consumer laws

#### aa) Layout of the new enforcement framework

In 2009, a tripartite structure of public bodies charged with consumer issues was implemented.<sup>76</sup> It consists of the ConsAA,<sup>77</sup> the Consumer Commission (CComm),<sup>78</sup> and the National Consumer Affairs Center (NCAC)<sup>79</sup> which had already existed before.<sup>80</sup> In the new system, the NCAC retains its previous function of gathering information from the local consumer centers,<sup>81</sup> most importantly by running a database reporting damage to consumers (PIO-Net),<sup>82</sup> and facilitating the exchange of information. The CComm is a peculiar Commission in that it is organizationally independent rather than being part of an agency, as is the case for most other Commissions advising government agencies. Thus, the CComm is able to set its own agenda and has even been referred to as being a “watchdog” over the ConsAA.<sup>83</sup> The ConsAA bundles various competencies that had formerly been divided between several Ministries,<sup>84</sup> such as the enforcement of the laws relating to food safety<sup>85</sup> and product labeling,<sup>86</sup> door-to-door sales,<sup>87</sup> and product safety.<sup>88</sup> Furthermore, the ConsAA’s tasks comprise policy-making; for instance the recently

76 Cf. for an overview T. MATSUMOTO, New Administrative Framework for Consumer Protection in Japan, Presentation Global Business Dialogue on e-Society (GBDe) 2010, General Assembly, Panel II, available at: [http://www.gbd-e.org/events/2010/assembly2010/pdf/Panel2\\_Moderator\\_Tsuneo\\_Matsumoto.pdf](http://www.gbd-e.org/events/2010/assembly2010/pdf/Panel2_Moderator_Tsuneo_Matsumoto.pdf).

77 *Shōhisha chō*, more information available at: <http://www.caa.go.jp/en/index.html>.

78 *Shōhisha iinkai*, more information available at: <http://www.cao.go.jp/consumer/en/e-index.html>.

79 *Kokumin seikatsu sentā*, more information available at: [http://www.kokusen.go.jp/ncac\\_index\\_e.html](http://www.kokusen.go.jp/ncac_index_e.html).

80 The NCAC had been established in 1970, see NAKAGAWA, *supra* note 64, 113; cf. the overview of the development of consumer protection policies in Japan provided by the Cabinet Office in 2006 is available at: <http://www.consumer.go.jp/english/cprj/>; cf. also M. TANI, Japan’s Consumer Policy, Policy Update 031, 2006, available at: <http://www.rieti.go.jp/en/special/policy-update/031.html>.

81 At the prefectural and the municipal level, local governments are required to provide aid for settlements between consumers and businesses; as of April 2003, there were 479 centers providing information as well as handling complaints and inquiries, cf. YAMAGAMI, *supra* note 35, 2.

82 For more information see <http://www.kokusen.go.jp/pionet/>.

83 NAKAGAWA, *supra* note 64, 110.

84 Cf. NAKAGAWA, *supra* note 64, 114.

85 *Shokuhin hyōji hō* [Food Labeling Act] No. 70/2013 (entry into force: 2015), available at: <http://law.e-gov.go.jp/announce/H25HO070.html>.

86 *Futō keihinrui oyobi futō hyōji bōshi hō* [Act against Unjustifiable Premiums and Misleading Representations] No. 134/1962.

87 *Tokutei shōtorihiki ni kansuru hōritsu* [Act on Specified Commercial Transactions] No. 57/1976.

88 *Shōhi seikatsuyō seihin anzen-hō* [Consumer Product Safety Act] No. 31/1973.

enacted law on collective actions for damages was drafted by the ConsAA.<sup>89</sup> It also supervises the NCAC<sup>90</sup> and uses the information gathered by the NCAC as an empirical basis for its proposals on policy reforms.<sup>91</sup> In short, the NCAC gathers and distributes information, the CComm provides advice on policy matters, and the ConsAA is involved in both of these fields as well as having some limited enforcement competencies.

*bb) Role of national enforcement bodies for standard form control*

Concerning the policing of consumer contract terms, none of these bodies has any specifically designated task. However, the CComm and the ConsAA have been charged with developing a proposal for reforms to the ConsCA.<sup>92</sup> They could thus exert an indirect influence on future control standards by reshaping Arts. 8–10 ConsCA to include extensive black and grey lists of suspect terms.<sup>93</sup>

In addition, it has been suggested that the ConsAA's competencies be extended to comprise orders against consumer rights' violations affecting a multitude of consumers;<sup>94</sup> the use of unfair standard terms would certainly qualify under this definition. Money penalties, cease-and-desist orders and orders to undo past illegal acts could serve to deter businesses from deliberately using unfair terms. Also, the market could be cleansed of unfair terms already in use (given that civil litigation initiated by individual consumers is rare). However, for the time being it seems rather unlikely that such a significant increase in powers will take place.

As a softer approach, it has been suggested that the ConsAA could facilitate the development of model standard contracts, e.g. for cell phone contracts or distance selling.<sup>95</sup> These topics are currently not sufficiently governed by sector-specific provisions<sup>96</sup> or existing model contracts;<sup>97</sup> therefore a regulatory gap exists which has also not yet been filled by an active judiciary.

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89 *Shōhisha saiban tetsuzuki tokurei hō* [Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers] No. 76/2013 promulgated on December 11, 2013; cf. CONSAA, *Towards a Safe and Prosperous Life*, 2014, 18; NAKAGAWA, *supra* note 64, 110.

90 CONSAA, *supra* note 89, 4.

91 Cf. CONSAA, *White Paper on Consumer Affairs*, 2013.

92 Letter by Prime Minister Abe to the Commission President, Shoji Kawakami, of 5 August 2014.

93 Cf. *supra* II.1.c). for the respective proposal already presented by *Nichibenren*.

94 Cf. for this proposal NAKAGAWA, *supra* note 64, 119.

95 NAKATA, *supra* note 22, 27.

96 Cf. *infra* II.2.b)bb).

97 Cf. for examples DERNAUER, *supra* note 19, paras. 12–15.

b) *Local and sector-specific control of contract terms by government bodies*

aa) *Local consumer protection regulations*

On the local level, several prefectures have specific consumer protection regulations prohibiting the use of unfair terms in consumer contracts.<sup>98</sup> The local agencies can impose administrative sanctions and in severe cases may publish the offender's name and wrongful actions.<sup>99</sup>

Apart from this formal competency, local consumer centers (*Shōhi seikatsu sentā*) are often the first contact point for consumers wishing to learn about their rights or bring a complaint. In 2013, a total of 925,000 consumer inquiries were reported nationwide.<sup>100</sup> Consumer centers also often negotiate with a business in order to resolve consumer complaints<sup>101</sup> and are in charge of applying alternative dispute resolution (ADR) mechanisms.<sup>102</sup> A conciliatory approach seems helpful since the effects of unfair contract terms are often perceived as a lack of goodwill on the business' part rather than as an infringement of rights. Also, in the majority of cases, even unfair terms have no effect at all since they only become relevant if the unlikely event they govern actually occurs. In this regard, out-of-court solutions seem a helpful alternative to regulation through agencies or courts in cases where individual consumers actually suffer the consequences of unfair terms.

bb) *Sector-specific notification and approval procedures*

There are various sector-specific rules providing that terms need to be notified to, or even be pre-approved by, the competent authorities when services or products are of particular importance to the general public.<sup>103</sup> In the case of utility contracts, the Agency for Natural Resources and Energy at METI is in charge of approving the price as well as all other terms in contracts for the supply of electricity<sup>104</sup> and gas<sup>105</sup>.<sup>106</sup> When the electricity com-

98 DERNAUER, *supra* note 19, paras. 16 et seq. mentions Tōkyō Prefecture and Kobe Prefecture as examples.

99 DERNAUER, *supra* note 19, para. 18.

100 CONSAA, *Towards a Safe and Prosperous Life* (Japanese version), 2014, 21.

101 Cf. generally on the importance of negotiation for solving consumer conflicts F. CAFAGGI/H.-W. MICKLITZ, *Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community*, in: EUI Working Paper 22 (2007) 8.

102 DERNAUER, *supra* note 21, 422; H. BAUM, *Mediation in Japan*, in: Hopt/Steffek (eds.), *Mediation. Principles and Regulation in Comparative Perspective* (Oxford 2013) 1021 et seq.; S. KAKIUCHI, *Regulation of Dispute Resolution in Japan: Alternative Dispute Resolution and its Background*, in: Steffek/Unberath (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (London 2014) 273 et seq.; see generally on ADR in Japan S. KAKIUCHI, *Die Förderung der außergerichtlichen Konfliktlösung in Japan*, in: *J.Japan.L.* 37 (2014) 3–23.

103 DERNAUER, *supra* note 19, para. 9.

104 Art. 19 para. 1 *Denki jigyō hō* [Electricity Business Act (EBA), No. 170/1964 as of 2011]: “A General Electricity Utility shall, pursuant to Ordinance of the Ministry of Economy,

pany HEPCO announced its wish to increase consumer rates by 17.03% in 2014,<sup>107</sup> it had to submit a respective application to METI for consideration. While detailed rules exist on the evaluation of whether the price reflects “fair costs”, the agency seems to have a wide margin of discretion when evaluating the ancillary supply conditions.

While at first glance it may be assumed that an administrative approval would guarantee a term’s “fairness” in the sense of Art. 10 ConsCA, this is not necessarily the case. It should be noted that considerations regarding the price are the focus of attention while other terms are only of minor importance for the approval decision. Furthermore, METI does not evaluate the terms from the perspective of achieving an optimal consumer protection but rather aims at balancing consumers’ interests against the business interests of utility companies. One consideration in this regard may be to foster innovation and future investment by approving terms favorable for the company, thus allowing for higher profits. Also, assuring fairness in the context of civil law aims at allowing an autonomous, informed decision by the individual. Where laws provide for an administrative pre-approval, freedom of choice is not necessarily the core aim of regulatory action, but the paternalistic approach can aim at other goals, such as promoting businesses’ interests or, conversely, protecting financially weak consumers.

In this regard, it may be viewed critically that an approval once granted stands practically no chance of being quashed or overturned in civil court.

#### cc) Outlook

It seems that the Japanese approach of controlling the contents of consumer contracts *ex ante* better addresses the fact that standard terms have market-wide effects. In this regard, standard terms are one variant of market practices. However, the electricity market for consumers will be de-regulated in 2016.<sup>108</sup> After a period of transition, rates will eventually no longer be checked by METI. The experience of the already de-regulated market for business customers shows that an enforcement gap may result. The Tokyo

Trade and Industry provisions, formulate general supply provisions to set rates and other supply conditions for electricity supply to meet general demand (excluding Specified-Scale Demand) and obtain approval of the provisions from the Minister of Economy, Trade and Industry. The same shall apply when a General Electricity Utility intends to revise the provisions.” Translation available at: <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=0&y=0&co=01&ia=03&ky=electricity+business+act&page=22>. Cf. MIZUTANI, *supra* note 5, 49 et seq.

105 Art. 17 para. 1 *Gasu jigyō-hō* (Gas Business Act No. 51/1954 as of 2011) contains the same wording as Art. 19 para. 1 EBA, see tentative translation available at: <http://www.japanese-lawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=0&y=0&co=01&ia=03&ky=electricity+business+act&page=3>. Cf. MIZUTANI, *supra* note 5, 65 et seq.

106 Cf. for more examples DERNAUER, *supra* note 19, para. 11; DÖRING, *supra* note 21, 224 et seq.

107 Press statement available at: <http://www.hepco.co.jp/english/index.html>.

108 The EBA is being amended accordingly by Act No. 44/2014.

Electricity Company (TEPCO) used terms in their contracts with large business customers allowing for unilateral price increases. After the Fukushima accident, TEPCO increased its rates considerably based on this at-will-clause. METI had no power to prohibit the clause and the Federal Trade Commission (FTC) was also in doubt as to whether TEPCO's actions were in violation of competition laws. Only after intensive negotiations did TEPCO agree to drop the term. Given that consumers will lack the bargaining power that TEPCO's large business customers have, it appears unlikely that utility companies would agree to alter their terms voluntarily. Therefore, judicial review may become an important tool for checking price-related terms once regulatory supervision is decreased and companies can set rates freely.<sup>109</sup>

### III. COMPARISON TO THE LEGAL SITUATION IN GERMANY

The possibility of increasing the price in utility contracts is of great practical relevance in Germany. Since 2008, the rates for electricity in Germany have risen by 38% for consumers, as opposed to an increase of merely 13–15% for industrial customers.<sup>110</sup> Following the Fukushima accident, the German government decided to end the use of nuclear power as a source for energy by 2022.<sup>111</sup> The reason for the marked discrepancy between consumer and industry prices is that costs resulting from this “energy change” (*Energiewende*) have to be borne in full by consumers while “energy-intensive” industries enjoy discounts in order to ensure their international competitiveness.<sup>112</sup>

Most consumer contracts rely on a standard clause allowing the utility company to adjust rates while granting the consumer a right to immediate termination of the contract in case of any price increase. However, the CJEU found such a clause to be unclear and thus void under European law. In the following section, the legal situation (*infra* 1.) and the CJEU's decision will be analyzed in detail (*infra* 2.). I will then look at what can be learned from the Japanese approach to controlling standard terms in order to improve certain shortcomings in the German system (*infra* 3.).

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109 It should be noted that METI is considering setting up a new regulatory body in charge of preventing abuses in the then de-regulated market.

110 <http://www.faz.net/aktuell/wirtschaft/neue-eeg-regelung-benachteiligt-private-haushalte-massiv-13146540.html>.

111 § 7 para. 1a Atomgesetz (Nuclear Power Act, German version available at: <http://www.gesetze-im-internet.de/atg/BJNR008140959.html>; cf. e.g. J. HAUCAP/S. CASSEL/T. THOMAS, *Energiewende mit Markt – sonst zahlt der Kunde mehr!*, in: *Econwatch Policy Brief* 6 (2012).

112 See e.g. E. GAWEL/C. KLASSERT, *Wie weiter mit der Besonderen Ausgleichsregelung im EEG?*, in: *UFZ Discussion Papers* 9 (2013); critically on the 2014 reform E. GAWEL/P. LEHMANN, *Die Förderung der erneuerbaren Energien nach der EEG-Reform 2014*, in: *Wirtschaftsdienst* 94 (2014) 651; cf. on the impact of energy prices on social justice P. HEINDL/R. SCHÜSSLER/A. LÖSCHEL, *Ist die Energiewende sozial gerecht?*, in: *Wirtschaftsdienst* 94 (2014) 508.

## 1. *Legal Background of the RWE case*

### a) *EU Directive on unfair terms in consumer contracts*

In 1993, the European Union enacted the Directive on unfair terms in consumer contracts (UTD).<sup>113</sup> German law had contained rules on standard terms since the enactment of the AGBG in 1976.<sup>114</sup> The Directive's provisions were incorporated into German law by making some amendments to the AGBG, which were included in §§ 305–310 BGB on the occasion of the 2002 civil law reforms.<sup>115</sup> Even though the UTD is not directly applicable, it has to be considered when evaluating the fairness of a term under §§ 307–309 BGB.<sup>116</sup> Consequently, questions as to the interpretation of the UTD have to be referred to the CJEU when they arise in the context of applying German law.<sup>117</sup>

The personal and material scope of application differs between the UTD and §§ 305, 310 BGB: The UTD only comprises consumer contracts but is applicable even if a term has only been used once,<sup>118</sup> whereas the German content control of § 307 BGB

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113 *Supra* note 17.

114 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen vom 9. Dezember 1976, BGBl. I, 3317; cf. L. RAISER, Die richterliche Kontrolle von Allgemeinen Geschäftsbedingungen, in: v. Caemmerer et al. (eds.), *Richterliche Kontrolle von Allgemeinen Geschäftsbedingungen* (Frankfurt a. M. 1968) 123; M. WOLF, Vertragsfreiheit und Vertragsrecht im Lichte der AGB-Rechtsprechung des Bundesgerichtshofs, in: Canaris et al. (eds.), *50 Jahre Bundesgerichtshof* (München 2000) 111.

115 Cf. for the controversial debate: J. SCHMIDT-RÄNTSCH, Reintegration der Verbraucherschutzgesetze durch den Entwurf eines Schuldrechtsmodernisierungsgesetzes, in: Schulze/Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Tübingen 2001) 169; P. ULMER, Integration des AGB-Gesetzes in das BGB?, in: *ibid.* 215; J. BASEDOW, Eine Deponie wird geschlossen – Ein Rückblick auf die Karriere des AGBG, in: *Zeitschrift für Europäisches Privatrecht* 2001, 434 („Müllkippe des Zivilrechts“); H.-D. HENSEN, Zur Entstehung des AGBG, in: Schlechtriem et al. (eds.), *Festschrift Heinrichs* (München 1998) 335; G. WEICK, Schuldrechtsreform, Transparenz und Gesetzgebungstechnik, in: *Juristenzeitung* (2002) 442.

116 Cf. generally on the interpretation of national law in conformity with EU rules CJEU of 10.04.1984 Case 14/83 von *Colson, Kamann v. Land Nordrhein-Westfalen*, para. 26; CJEU of 05.10.2004 Joint Cases C-397/01 to C-403/01 *Pfeiffer et al. v. Deutsches Rotes Kreuz Waldshut*, para. 113; P. CRAIG/G. DE BÚRCA, *EU Law* (5th ed., Oxford et al. 2011) 200 et seq.; W.-H. ROTH, Richtlinienkonforme Auslegung in: Riesenhuber (ed.), *Europäische Methodenlehre* (2nd ed., Berlin et al. 2010) 395; N. BALDAUF, Richtlinienverstoß und Verschiebung der Contra-*legem*-Grenze im Privatrechtsverhältnis (Tübingen 2013) 108 et seq.

117 The BGH as a court of last resort is obliged to refer a question of interpretation to the CJEU, lower courts may do so, cf. Art. 267 Treaty on the Functioning of the European Union (TFEU).

118 Cf. Art. 3 para. 2 UTD: “A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”

applies to any transaction regardless of the parties' role but requires, in principle,<sup>119</sup> that standard forms are used in a multitude of cases. However, the divergences in the scope of application indicate a fundamental difference in the aims pursued and consequently the interpretation of the meaning of "unfairness".<sup>120</sup>

*b) Evaluation of price adjustment clauses prior to the CJEU's decision*

Price adjustment clauses play an important role in utility contracts because of the frequency of price increases. It is therefore not surprising that they are quite frequently the subject of litigation.<sup>121</sup> By as early as 2009, the German Supreme Court (*Bundesgerichtshof*, BGH) had decided that a clause which states neither cause, mode nor extent of price adjustments clearly in advance does not meet the requirement of transparency.<sup>122</sup> However, a particularity of the German energy market regulation "saved" the clause from being rendered void: Utility companies mostly supply consumers based on a so-called "special contract", i.e. a contract concluded under ordinary civil law. However, in order to guarantee consumers' access to necessary utilities, companies are required to supply consumers based on a "standard tariff contract" even in the absence of an express contract.<sup>123</sup> Since this is not a contract in the sense of the BGB, its terms are supplied by law. Specifically, § 5 paras 2, 3 GasVV<sup>124</sup> allows for price adjustments.<sup>125</sup> The utility company in the BGH case of 2009 had merely copied the legal provision applicable to standard tariff contracts into its standard terms for special contracts. The BGH approved the use of an unclear term only in this particular context in order to secure the equal treatment of special contracts and standard tariff contracts.<sup>126</sup>

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119 In order to comply with the UTD's broader (and thus more consumer-friendly) scope of application, § 310 para. 3 no. 2 BGB now includes "preformulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the preformulation, had no influence on their contents".

120 Cf. e.g. H.-W. MICKLITZ, *AGB-Gesetz und die EG-Richtlinie über missbräuchliche Vertragsklauseln in Verbraucherverträgen*, in: *Zeitschrift für das Europäische Privatrecht* 1993, 524; N. REICH, *Zur Theorie des Europäischen Verbraucherrechtes*, in: *Zeitschrift für das Europäische Privatrecht* 1994, 392.

121 See for an overview T. SCHÖNE, *Stromlieferverträge*, in: Graf v. Westphalen/Thüsing (eds.), *Vertragsrecht und AGB-Klauselwerke* (2014) paras. 171–179.

122 BGH, in: *Neue Juristische Wochenschrift* 2009, 2662 para. 23; BGH, in: *Neue Juristische Wochenschrift* 2009, 2667 para. 26; BGH, in: *Neue Juristische Wochenschrift* 2011, 50 para. 33.

123 Cf. for details on the standard tariff supply G. HENDRICH, *supra* note 11, paras. 44 et seq.

124 *Gasgrundversorgungsverordnung*; in the case leading to the referral to the CJEU, the identical § 4 Abs. 1 AVBGasV was still applicable, cf. K. MARKERT, *Anmerkung*, in: LMK 2013, 345547.

125 But cf. CJEU of 23.10.2014 *Joined Cases C-359/11 Alexandra Schulz v. Technische Werke Schussental GmbH und Co. KG* and *C-400/11 Josef Egbringhoff v. Stadtwerke Ahaus GmbH* in which this legal provision was declared incompatible with Art. 3 para. 5 Electricity Markets Directive (*supra* note 9) and Art. 3 Abs. 3 Gas Markets Directive (*supra* note 9).

126 BGH, in: *Neue Juristische Wochenschrift* 2009, 2667, 2669; cf. approvingly U. BÜDENBENDER, *Die neue Rechtsprechung des BGH zu Preisanpassungsklauseln in Energie-*

## 2. *The RWE case*

### a) *Facts of the case and decision by the CJEU*

*RWE* is a German utility company supplying gas to 7.8 million households and businesses in Europe.<sup>127</sup> Following the BGH's seemingly settled case law, their contract included a standard term allowing *RWE* to vary prices unilaterally without stating the grounds, conditions or scope of the variation.<sup>128</sup> Even though the term contained a right for the consumer to terminate the contract in case of price adjustments, no alternative suppliers were available when *RWE* increased its gas prices 4 times between 2003 and 2005.<sup>129</sup> In its 2009 decision, the BGH had omitted any mention of the UTD and had not even considered a referral to the CJEU. However, after the Higher Regional Court (*Oberlandesgericht*) of Oldenburg had referred a case based on a similar fact pattern to the CJEU in 2011,<sup>130</sup> the BGH referred the term used by *RWE* to the CJEU.<sup>131</sup> In its decision, the CJEU confirmed that a price adjustment term has to clearly state the reason for and the method of any future variation in the price in order to make such alterations foreseeable for consumers.<sup>132</sup> Providing a right to terminate the contract is declared a necessary, but not a sufficient, measure to render a term fair.<sup>133</sup>

### b) *Consequences*

Following the CJEU's decision, the BGH had to abandon its stance of regarding the statutory rules for standard tariff contracts as guidance (*Leitbildcharakter*) which could save a clause otherwise lacking in transparency.<sup>134</sup> The *RWE* case exemplifies several interesting points related to the enforcement of standard terms legislation. First, the above-mentioned justification that a control is needed because standard terms are usually insignificant to a consumer and therefore not read,<sup>135</sup> falls short where terms are "salient", such as a price adjustment clause.<sup>136</sup> Consequently, the control of standard terms is based on a more multifaceted aim, depending on the product or service (relevant questions in this regard are, for instance: is there competition on the market? Is the product

lieferungsverträgen, in: *Neue Juristische Wochenschrift* 2009, 3127; affirmed in the BGH's referral of the *RWE* case, see BGH, in: *Neue Juristische Wochenschrift* 2011, 1392, Rn. 21.

127 <http://www.rwe.com/web/cms/de/1455940/rwe/ueber-rwe/geschaeftsaktivitaeten/kunden/>.

128 CJEU of 21.03.2013 Case C-92/11 *RWE Vertrieb AG v. Verbraucherzentrale Nordrhein-Westfalen e.V.*, para. 18.

129 CJEU *RWE* para. 19.

130 OLG Oldenburg, in: BeckRS 2011, 08627.

131 See MARKERT, *supra* note 124.

132 CJEU *RWE*, para. 49; affirming CJEU of 26.04.2012 Case C-472/10 *Invitel*, paras. 24, 26, 28.

133 CJEU *RWE*, paras. 51 et seq.

134 BGHZ 198, 111 = *Neue Juristische Wochenschrift* 2013, 3647.

135 See *supra* I.2.a).

136 Cf. KOROBKIN, *supra* note 13, 1206; TRSTENJAK, Opinion in Case C-92/11 *RWE* of 13.09.2012, para. 86.

necessary for everyday life?) and the type of contract (e.g. a long-term contract, conclusion via internet).

Second, the CJEU acknowledges that the interests of both parties have to be considered; in the *RWE* case there was a clash between the legitimate interest of the business to pass on rising costs<sup>137</sup> and the consumers' interest to foresee future prices. A weighing of interests necessarily involves, to some extent, a value judgment. It is thus likely that different courts will come to different conclusions, rendering the application of the UTD in the Member States less foreseeable and heterogeneous.<sup>138</sup> However, it is appropriate to grant national bodies the final say on whether a term is permissible, seeing that market environments differ considerably across the EU. The supply of utilities to consumers in Germany is commonly based on indeterminate contracts requiring a price adjustment clause to brace against as yet unforeseeable price increases. Conversely, for instance British suppliers usually offer annual contracts which reflect price increases with higher rates when the contract is renewed, thus avoiding the need for price adjustment terms all together.

Third, the *RWE* case shows that civil litigation is not always an efficient means of control. In 2013, the BGH handed down four decisions on price terms in contracts for the supply of gas,<sup>139</sup> and nine cases were decided by (Higher) Regional Courts.<sup>140</sup> The

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137 EuGH *RWE*, Rn. 53; s. concurring e.g. F.J. SÄCKER/K. MENGERING, Rechtsfolgen unwirksamer Preisanpassungsklauseln in Endkundenverträgen über Strom und Gas, in: Betriebsberater 2013, 1862.

138 Hopes that the UTD would lead to considerable harmonization of the Member States' laws relating to contracts were disappointed, cf. e.g. KOM (2000) 248, 30; G. ALPA, Standard Contract Terms: The Role of the Courts and Moral Persuasion by Independent Authorities, in: Collins (ed.), Standard Contract Terms in Europe (Alphen Aan den Rijn 2008) 89; J. BASEDOW, Der Europäische Gerichtshof und die Klauselrichtlinie 93/13: Der verweigerte Dialog, in: Müller et al. (eds.), Festschrift Hirsch (München 2008) 52; U. BERNITZ, The Commission's Communications and standard contract terms, in: Vogenauer/Weatherill (eds.), Harmonisation of European Contract Law (Oxford et al. 2006) 185; E. FERRANTE, Contractual Disclosure and Remedies under the Unfair Contract Terms Directive, in: Howells/Janssen/Schulze (eds.), Information rights and obligations (Aldershot 2005) 115; E. HONDIUS, Unfair contract terms: towards a European Law – Introduction, in: European Review of Private Law 1997, 121; T. PFEIFFER, 20 Jahre Klauselrichtlinie: Mehrebenen-Privatrecht in schärfster Ausprägung, in: Europäische Zeitschrift für Wirtschaftsrecht 2013, 241; F. RANIERI, Europäisches Obligationenrecht (3rd ed., Vienna 2009) 420 et seq.; M. SCHILLIG, Konkretisierungskompetenz und Konkretisierungsmethoden im Europäischen Privatrecht (Berlin 2009) 251 et seq.; S. WHITTAKER, Assessing the fairness of contract terms, in: Zeitschrift für Europäisches Privatrecht 2004, 75.

139 BGHZ 198, 111 = Neue Juristische Wochenschrift 2013, 3647 (*RWE* case); BGH, in: Neue Juristische Wochenschrift 2013, 2814; BGH, in: Neue Juristische Wochenschrift 2013, 991; BGH, in: Zeitschrift für das gesamte Recht der Energiewirtschaft 2013, 225.

140 OLG Sachsen-Anhalt, in: Recht der Energiewirtschaft 2014, 247; OLG Düsseldorf, in: Contracting und Recht 2013, 168 = Betriebsberater 2013, 3009; LG Osnabrück, judgment of 12.04.2013, Case 1 O 2915/12, in: juris; KG Berlin, in: BeckRS 2014, 09694 (followed by BGH, in: Neue Juristische Wochenschrift 2014, 2715); OLG Sachsen-Anhalt, judgment of

jurisprudence on price terms in utility contracts has been called “widely ramified”<sup>141</sup> and an attorney who represented *RWE* in the case before the BGH and the CJEU even suggested that the legislator should regulate special contracts as well since it seemed impossible to draft a price adjustment term given the multi-level judicial review.<sup>142</sup>

Indeed, relying on civil litigation as a regulatory approach seems inadequate from the view of all parties involved: utility companies will only know years later whether the term they used – even one based on the legislator’s blueprint – was valid; challenging such terms requires a high degree of legal expertise that an average consumer does not possess, the enforcement therefore relies completely on consumer organizations; courts are overwhelmed because each case needs to be decided individually; and consumers may eventually not be better off because sums paid based on the invalid price adjustment clause are not automatically reimbursed but need to be claimed from the utility company by the consumer.<sup>143</sup>

### 3. *What lessons can be learned from the Japanese model?*

In its efforts to enhance consumer protection by creating more substantive civil rules, the Japanese legislator has looked to the legal situation in Germany and the EU for inspiration.<sup>144</sup> Certainly, the black letter law in Europe seems more sophisticated than the Japanese civil law provisions on standard terms. However, when considering the practical impact the different protection mechanisms have, Japanese consumers appear rather well cared for in comparison to their German counterparts. This surely reflects a fundamental distinction in private law philosophy: From a traditional German standpoint, private individuals are expected to behave autonomously and responsibly, which is why the incremental introduction of protective elements into civil law has been a controver-

26.02.2013, Case 12 U 168/12, in: juris; OLG Koblenz, in: *Recht der Energiewirtschaft* 2013, 285 = *Betriebsberater* 2013, 513; OLG Hamburg, in: *Zeitschrift für Miet- und Raumrecht* 2013, 279; OLG Bamberg, in: *Recht der Energiewirtschaft* 2013, 273; OLG Frankfurt, judgment of 15.01.2013 Case 16 U 134/12, in: juris.

141 G. KÜHNE, Anmerkung, in: *Neue Juristische Wochenschrift* 2014, 2714: “inzwischen weit verzweigte höchstrichterliche Rechtsprechung zum AGB-Recht in ihrer Anwendung auf Energielieferverträge”; cf. also the general references in *supra* note 42.

142 Opinion expressed by PETER ROSIN (Clifford Chance), “Energierrechtlicher Workshop zu Preisanpassungsklauseln”, 23.09.2013, Institut für Energie- und Regulierungsrecht Berlin.

143 In the event, it seems that most consumers did not make such claims, cf. e.g. <http://www.vz-nrw.de/gasrueckforderung>; [http://www.energieverbraucher.de/de/News\\_1700/](http://www.energieverbraucher.de/de/News_1700/); consumers are supported in making their claim by the consumer organizations (cf. e.g. <http://www.vz-nrw.de/gaskunden>) and the ADR body for energy law (<http://www.schlichtungsstelle-energie.de/>).

144 Cf. generally on the openness of Japanese scholars to comparative analysis G. COLOMBO, *Japan as a Victim of Comparative Law*, in: *Michigan State International Law Review* 22 (2014) 747.

sial process.<sup>145</sup> It fits the paradigm of individual responsibility that civil litigation is the main means of redress for consumers and that businesses are responsible for drafting fair terms.<sup>146</sup> The administrative, ex ante review applied to many standard terms in Japan lifts this burden off of businesses, albeit at the cost of depriving them of their full discretion when determining the content of the contract. It has been argued that administrative control and judicial (collective) enforcement are functionally complementary in consumer law.<sup>147</sup> Indeed, both countries experienced a paradigm shift in recent years. In Japan, litigation is being fostered, inter alia, by amending the substantive law as it became clear that a purely administrative approach could not prevent, nor adequately address, injuries.<sup>148</sup> Conversely, judicial review of standard terms in Germany has traditionally been driven by consumer organizations<sup>149</sup> but, due to European legislation,<sup>150</sup> the role of agencies is increasingly important. Also, alternative dispute resolution (ADR)<sup>151</sup> and mediation<sup>152</sup> are promoted by the EU in order to allow for quicker and more accessible out-of-court resolutions to consumer disputes.

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145 Cf. for the so-called “materialization” (*Materialisierung*) of German civil law F. WIEACKER, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Karlsruhe 1952); W. CANARIS, *Wandlungen des Schuldvertragsrechts. Tendenzen zu seiner „Materialisierung“*, in: *Archiv für die civilistische Praxis* 200 (2000) 273; see also J. DREXL, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (Tübingen 1998) 35–43; H.-W. MICKLITZ, *The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic*, in: *EUI Working Paper Law 3* (2012) 4 et seq.; M. FORNASIER, *Freier Markt und zwingendes Vertragsrecht* (Berlin 2013) 77 et seq.

146 The CJEU has expressly rejected the idea that terms deemed unfair may be reduced by courts to make their content permissible, see CJEU of 14.06.2012 Case C-608/10 *Banco Español de Crédito*, paras. 58 et seq, 69; cf. on this issue also BGH, in: *Neue Juristische Wochenschrift* 2005, 1277; BGHZ 143, 104 = *Neue Juristische Wochenschrift* 2000, 1113.

147 CAFAGGI/MICKLITZ, *supra* note 101, 5.

148 NAKATA, *supra* note 30, 544.

149 Cf. CAFAGGI/MICKLITZ, *supra* note 101, 6 et seq. (comparing Germany to the Scandinavian countries’ ombudsman system).

150 The Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364 of 09.12.2004, 1) requires Member States to designate a competent a public authority in charge of applying the Regulation (Art. 4); the Directive 98/27/EC on injunctions for the protection of consumers’ interests (OJ L 166 of 11.06.1998, 51) had merely required that a “qualified entity” – comprising consumer organizations – exists to bring actions for injunctions (Art. 3).

151 According to Art. 3 para. 13 Electricity Markets Directive (*supra* note 9); Art. 3 para. 9 Gas Markets Directive (*supra* note 9), a settlement body has to be designated by each Member State; the German Schlichtungsstelle Energie has been in charge since 2011, more information available at: <http://www.schlichtungsstelle-energie.de>. More generally, efforts have been made to streamline settlement procedures by the Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes; and the Regulation (EU) No. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes.

152 Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

Nevertheless, the *RWE* case shows that there are still great gaps in consumer protection from unfair standard terms in Germany. One problem is the lack of oversight, on both the German and European levels. Moreover, even experts state that the German courts' highly detailed jurisprudence is now difficult to grasp. It seems rather unlikely that businesses from other Member States will manage fully to understand the legal situation governing their standard terms when offering goods or services in Germany.

In my view, the Japanese ConsAA provides an interesting model for improving the application of the UTD on the European level. Instead of creating a large, centralized agency, there should be a body – possibly attached to the Directorate-General for Competition or the newly created Directorate-General for Justice, Consumers and Gender Equality<sup>153</sup> – facilitating the collection and the exchange of information. A database of national decisions covering the scope of the application of the UTD, similar to PIO-Net in Japan, has unfortunately been discontinued.<sup>154</sup> This project should be revived and maintained by the new body. As cases would be reported directly from the Member States, few resources would be needed on the EU level, especially once the initial effort of including past decisions has been completed. Such a database would not only enable businesses and legal practitioners to gain easy access to the legal situation in other Member States, but could also provide a basis for legislative reform, for instance if the data shows that certain unfair terms are in widespread use and should be black-listed.

Although such an institution may be foreign to the current enforcement system, it is in my view necessary to remedy short-comings that have led to the failure of the UTD in an area where effective regulation could indeed reduce transaction costs and foster cross-border trade. Rather than discussing the further Europeanization of substantive law, the institutional design should be fundamentally revised.

## SUMMARY

*The article compares the legal regimes governing price adjustments in utility contracts for consumers in Germany and in Japan. Although the contract between a consumer and the utility provider itself constitutes a civil law relationship, its content is shaped by sector-specific regulation. The degree to which private autonomy is restricted varies between the two countries. German utility markets have been liberalized and the only method for controlling the validity of price increases is the judicial control of the adjustment terms contained in contractual fine print. In Japan, consumer markets remain regulated and price increases must be pre-approved by the government. However, re-*

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153 Cf. press release IP/14/984 of 10.09.2014, available at: [http://europa.eu/rapid/press-release\\_IP-14-984\\_en.htm](http://europa.eu/rapid/press-release_IP-14-984_en.htm).

154 See H.-W. MICKLITZ/M. RADEIDEH, CLAB Europa – The European Database on Unfair Terms in Consumer Contracts, in: *Journal of Consumer Policy* 28 (2005) 325.

*forms are underway to liberalize the markets. Such reforms will increase the importance of civil law as a means to securing consumer protection. Furthermore, a shift in enforcement paradigms may be necessary. So far, consumer protection lies mostly in the hands of public agencies, with a new Consumer Affairs Agency having been established only five years ago. At the same time, reforms have been undertaken to foster civil litigation, be it by individual consumers or as means of collective redress. Consequently, a mix of ex ante and ex post enforcement is present in Japan. Conversely, enforcement in Germany relies on individuals or consumer organizations bringing a claim in court. No systematic method exists to prevent unfair terms from being used in the market. In addition, the European Directive on Unfair Terms has hardly achieved its goal of allowing traders to use one set of standard terms in the Internal Market because its enforcement was left to the Member States. Therefore, a central institution should be implemented on the European level which collects and disseminates information on national cases. The Japanese Consumer Affairs Agency and its PIO-Net database of cases could be a useful model.*

#### ZUSAMMENFASSUNG

*Der Aufsatz vergleicht die Rechtslage für Preisanpassungsklauseln in Verbraucherverträgen über Energielieferungen in Deutschland und Japan. Obgleich der Vertrag zwischen einem Verbraucher und dem Energieversorger ein zivilrechtliches Verhältnis begründet, wird deren Inhalt doch auch von sektorspezifischer Regulierung mitbestimmt. Dabei unterscheidet sich das Ausmaß der Beschränkung der Privatautonomie in beiden Ländern. Der deutsche Energiemarkt ist bereits liberalisiert worden, sodass eine Preisanpassung nur noch durch die gerichtliche Prüfung der ihr zugrundeliegenden AGB kontrolliert werden kann. In Japan sind Verbrauchermärkte für Energie nach wie vor streng reguliert und Preiserhöhungen müssen durch die zuständige Behörde vorab genehmigt werden. Allerdings wurden Reformen zur Liberalisierung auf den Weg gebracht. Hierdurch wird nicht nur dem Zivilrecht eine größere Bedeutung für den Verbraucherschutz zuwachsen. Vielmehr könnte ein Wandel der Durchsetzung verbraucherschützender Regeln notwendig werden. Bislang ruht diese vor allem in den Händen Behörden, eine neue Verbraucherbehörde wurde erst 2009 gegründet. Zugleich wird aber auch das Zivilprozessrecht reformiert, um sowohl individuelle als auch kollektive Klagemöglichkeiten zu stärken. Somit weist das Durchsetzungssystem in Japan Mittel zum vorherigen als auch zum nachträglichen Schutz auf. In Deutschland hingegen hängt die Durchsetzung davon ab, dass Einzelne oder Verbraucherorganisationen vor Gericht ziehen. Es besteht keine institutionalisierte Möglichkeit, die Verwendung missbräuchlicher AGB vorab zu verhindern. Überdies hat die Europäische Klausel-Richtlinie ihr Ziel, Unternehmen die Verwendung einheitlicher AGB im europäischen Binnenmarkt zu erlauben, weitestgehend verfehlt, weil die Anwendung der Richtlinie den Mitgliedstaaten überlassen wurde. Daher sollte eine zentrale Stelle auf europäischer Ebene einge-*

*richtet werden. Ähnlich dem Vorbild der japanischen Verbraucherbehörde könnte diese zentrale Stelle Informationen aus den Mitgliedstaaten sammeln und zur Verfügung stellen. Besonders empfehlenswert scheint die Einrichtung einer Datenbank über nationales Fallrecht, wie es sie mit der PIO-Net-Datenbank in Japan für Schadensfälle gibt.*